SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1430

GLORIA SANDQUIST,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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To: The Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks the issuance of a Writ of Certiorari to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of

Los Angeles, affirming the judgment of the Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California, convicting petitioner of a various violations of California Penal Code §311.2 (exhibiting obscene motion pictures) and thereafter, on February 14, 1975, denying petitioner's application for a rehearing after the said judgment was affirmed on appeal and further denying petitioner's application for certification of the cause to the Court of Appeal of the State of California. There was no written opinion either in the trial Court or in the reviewing Court. (See Appendix for copy of order denying rehearing and denying certification.)

This Court has jurisdiction to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles under 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

1. Does California Penal Code §311.2, the statute under which petitioner was convicted, meet the requirements of specificity established by California v. Miller as a prerequisite for the exercise of State power to restrict exhibition of motion pictures to consenting adults who pay an admissions price to see the exhibition?

2. Do constitutional policies disfavoring ex post facto criminal punishment prevent the California Appellate Courts from so reconstruing Penal Code §311.2 as to meet the Miller requirements of specificity?

3. Do the First, Fourth and Fourteenth Amendments to the United States Constitution deprive the several States of any power to restrict, on the ground of obscenity, exhibition of motion pictures to consenting adults who pay an admission price to see the exhibitions?

4. Where there is a conflict between the trial Judge and the defense attorney as to the events occurring in the

misdemeanor trial and the trial Judge certifies a statement of facts with which the appellant-defendant disagrees, does the Fourteenth Amendment to the United States Constitution require that the appellant-defendant be supplied free of charge with a Reporter's Transcript of the proceedings below for the purposes of this appeal?

5. Is it proper to instruct the jury engaged in deliberating on an obscenity charge that obscenity of the material or conduct involved is to be measured by a "controlling community" defined to be the entire State of California rather than the locality in the State of California in which the alleged crime took place?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution -- Article 1, Section 9, Clause 3:

> "No Bill of Attainder or ex post facto law shall be passed."

United States Constitution -- Article 1, Section 10, Clause 1:

"No State shall . . . pass any Bill of Attainder, ex post facto law, ..."

United States Constitution -- First Amendment:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

United States Constitution -- Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by Oath or affirmation, by particularly describing the places to be searched, and the person or things to be seized."

United States Constitution -- Fourteenth Amendment:

"Section 1. All persons born or naturalized in the United States,

and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution -- Article 1, Section 16:

"No Bill of Attainder, ex post facto law or law impairing the obligation of contracts shall ever be passed."

California Penal Code §311:

"Definitions.

"As used in this Chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the

predominant appeal of the matter, taken as a whole, is a prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and this matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Persons' means any individual, partnership, firm, association, corporation or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means being aware of the character or the matter or life conduct."

California Penal Code §311.2:

"Sending or bringing into State for sale or distribution; printing, exhibiting, distributing or possessing within State.

"(a) Every person who knowingly:

"Sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State propose, publishes, prints, exhibits, distributes or offers to distribute, or keeps in his possession with intent to distribute or to exhibit or effort to distribute, any obscene matter, is guilty of a misdemeanor. . . ."

STATEMENT OF THE CASE

Petitioner, Gloria Sandquist, operated a movie theater called the "Kozy Kitten" in Bellflower, California. She was brought to jury trial in the Municipal Court of Los Cerritos Judicial District, County of Los Angeles, State of California on five consolidated cases, namely Actions Nos. M-38945, M-40594, M-41767, M-51531, and M-51883 in said Municipal Court.

On November 15, 1973 she was found guilty of one count in each of said Actions Nos. M-40594, M-41767, M-5153 and M-51883 and five counts in said Action No. M-38945. Each of said counts charged a violation, on a separate occasion, of California Penal Code §311.2, namely exhibition of obscene motion pictures in the Kozy Kitten.

Petitioner was sentenced in said Municipal Court on said convictions on December 14, 1973. In Action No. M-51883 she was granted a three-year summary probation conditioned on closing the Kozy Kitten and paying a fine of $500 or serving 50 days plus a police officer training

assessment of $125 and on the further condition that she spend 45 days in the County Jail. She received identical sentences on each of the other counts, including the five counts in Action No. M-38945 except that she was to serve 90 days in the County Jail. All sentences were consecutive and cumulative. The result was that she was to serve a total of 765 days in the County Jail (well over two years) and to pay fines totaling $5,725 or serve an additional 450 days in the County Jail.

Prior to trial, timely demurrers were interposed in each of said actions attacking the constitutionality of Penal Code §311.2 on the grounds urged herein and said demurrers were overruled.

A timely appeal was taken to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. A certified court reporter had taken down the proceedings during the trial but no transcript thereof was made. The trial Court engrossed a "Statement of Facts on Appeal" to the Appellate Department of the Superior

Court of State of California and said statement differed in material respects from the statement desired by petitioner's attorney. Accordingly, petitioner's attorney made a motion in said Appellate Department of the Superior Court of the State of California for the County of Los Angeles that a free Reporter's Transcript of the proceedings in the trial be supplied for the purposes of appeal. This motion was denied and the appeal was decided on the basis of the engrossed Statement of Facts on Appeal.

The judgment of the trial Court was affirmed without an opinion and petitioner thereafter timely applied for certification to the California Court of Appeal pursuant to Rule 63(b) and in the alternative applied for a rehearing and requested that the decision be delayed until this Honorable Court ruled upon the case of Miranda v. Hicks (the case in the United States District Court, Central District of California wherein a three-judge Court held that California Penal Code §311.2 was obnoxious to the First and Fourteenth Amendment to the United

States Constitution and therefor unconstitutional, this Honorable Court having granted a hearing thereon and presently said case being under review by this Honorable Court). These petitions were denied on February 14, 1975.

Thereafter, upon application by petitioner, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, made an order on March 25, 1975 to grant the remittitur to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles Case Nos. CR A 12422, CR A 12423, CR A 12424, CR A 12425, and CR A 12426 (the numbers given to said Municipal Court cases in the said Appellate Department) be stayed pending further consideration of the application. On April 9, 1975, said order was continued pending the timely filing and disposition of a Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

On its Face, California Penal Code §311.2 (the Statute Under Which Petitioner Was Convicted) Does Not Meet the Miller Requirement of Specifically Defining Prohibited Depiction of Sexual Misconduct and is Therefore in Conflict With Due Process Requirements of Certainty and Unconstitutional

Miller v. California, 413 U.S. 15, was an effort of the United States Supreme Court to finally and definitively settle the question of permissive state regulation of alleged pornography and sexual obscenity.

In Miller, the rule enunciated by Chief Justice Burger and agreed to by five Justices of the United States Supreme Court is that:

> ". . . we acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene material must be carefully limited . . . (Citations) . . . . As a result, we

now can confine the permissible scope of such regulation to works which depict the described sexual conduct. That conduct must be specifically defined by the applicable State law, as written or authoritatively construed. A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in the patently offensive way, and which, taken as a whole do not have serious literary, artistic, political or scientific value.

"The basic guidelines for the trier of fact must be:

"(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (Citations) . . . .

"(b) Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable

State law.

"(c) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. We do not adopt to the Constitutional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts, supra, 338 U.S. F. 419 . . . ." (37 L.Ed.2d 430 - 431 emphasis added.)

Examples of what a State statute could define for regulation under (b) of the above tests, are given for Miller as follows:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." (37 L.Ed.2d 431).

The importance of a State's specific definition of "hard core" sexual conduct

to be proscribed is emphasized as follows:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by regulating State law as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (37 L.Ed.2d 432-433, emphasis added).

California Penal Code §311.2 prohibits exhibition of "obscene" matter and "obscene" matter is defined in Penal Code §311(a).

The vice of these Penal Code sections with relation to the Miller requirements is that they embody only two of the three basic elements therein set forth, omitting the element that the proscribed conduct must be specifically defined.

Obviously, the indicated Penal Code sections were designed to meet the test of Memoirs v. Massachusetts, 383 U.S. 413. The Memoirs test is now recognized by all members of the United States Supreme Court to be unworkable; and has been abandoned (37 L.Ed.2d 430).

> But the Miller test changes the Memoirs test: It makes it more stringent by requiring that the proscribed "obscenity" be specifically defined; and it removes the requirement that the context of the alleged "obscenity" be utterly without redeeming social value.

Clearly the California Legislature could not anticipate the Miller test and there seems no question that the specificity required by the Miller test is not present under the California statute in question. The specific act of sexual conduct that the Legislature does not want to be exhibited in motion pictures is not set forth in the California statute. All that is set forth is the broad generalization of Memoirs.

In People v. McCaughan, 49 Cal.2d 409, the California Supreme Court states:

> "(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application violates the first essential of due process of law."

Patently the California State Law designed to embody the Constitutional requirement of Memoirs, that the Justices of the United States Supreme Court now find to be too opaque to be workable, can be no less opaque and hence must be too vague to meet the requirements of due process.

In Miranda v. Hicks, in a memorandum opinion filed by a three-judge Court, in the United States District Court Central District of California, in Case Number Civil 73-2775-F, it was held, that Penal Code §311.2 is unconstitutional in accordance with an analysis similar to the above. The United States Supreme Court

has, since the date of that opinion, which was June 4, 1974, granted a Petition for a Writ of Certiorari and the case is presently under consideration.

In view of the foregoing considerations, it appears plain that the ruling in Miranda v. Hicks, supra, is correct and that Penal Code §311.2 is unconstitutional because of vagueness.

II

Efforts by the California Appellate Courts to So Reconstrue Penal Code §311.2 as to Meet the Miller Requirement of Certainty is Unconstitutional Because Such Action Violates the Spirit, if Not the Letter, of Constitutional Policies Prohibiting Ex Post Facto Criminal Punishment

United States Constitution, Article I, Sections 9 and 10 and California Constitution, Article I, Section 16 express a constitutional policy against retroactive substantive effect being given to Penal Law. Plainly the due process clause of the Fourteenth Amendment to the United States Constitution prevents evasion of this policy by a state Appellate Court

changing the interpretation of a criminal statute and giving the change a retroactive effect.

Clearly, prior to Miller, the California Appellate Courts have had no reason to interpret California Penal Code §311.2 so as to give it the specificity required by Miller. As previously discussed, this statute was designed to meet the Memoirs test and there was no occassion for the Appellate Courts of California to go any further than to say that it had met such test. Manifestly, there was no reason to attempt any further clarification that would meet the requirements of Miller because Miller has no precursors. Whether or not, §311.2 can be a given prosecutive effect by reinterpretation is another problem. In passing, it would seem that it could not because the Legislature and not the Courts writs our laws. Obviously the Legislature could not anticipate the Miller test of specificity and it is the Legislature and not the Courts who should determine what is obscene in California, so long as constitutional standards are met.

It would seem manifest that, consistent with due process, an individual should not be expected to know the criminal law concerning obscenity if the United States Supreme Court does not know that law or if the California Supreme Court does not know that law.

Thus, when the United States Supreme Court, after over a decade of struggling with what is proper State action in regard to obscenity, finally takes a definitive and clear stand, abandoning earlier notions of what the Constitution requires and substituting in its place what are hoped to be better and more accurate interpretations of the Constitution, the effect is to present a clear guideline for the future action of the individual. Obviously, however, the individual could not know before such new interpretation that it would be made and it is unrealistic and hypocritical to expect that he would. A fortiorari, the individual could not be expected to know what the California Appellate Courts might believe was intended by the Legislature in view of the new Miller rule.

Miller v. Harris, 347 U.S. 612, 617 -- Holding that no man should be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Since the California statutes do not on their face meet the requirements of Miller, any interpretation of those statutes to conform to Miller must be prospective in application only or else run afoul of the constitutional policies against retroactive sanctions. Obviously, such changes in law by Court decision have the thrust of statutory changes.

III

The First, Fourth and Fourteenth Amendments to the United States Constitution Deprive the Several States of Any Power to Restrict, on the Ground of Obscenity, Exhibition of Motion Pictures to Consenting Adults Who Pay an Admission Price to See the Exhibition; and therefore the Statute Under Which Petitioner Was Convicted is Unconstitutional

As this petition for a Writ of Certiorari is being written, the case of Hicks

v. Miranda is pending in the United States Supreme Court, after a finding by a three-judge court in the United States District Court for the Central District of California that California Penal Code §311.2 is unconstitutional; in Hicks v. Miranda, certiorari has been granted. The three-judge court was made up by the Honorable Walter Ely, Circuit Judge of the United States Court of Appeals, Ninth Circuit; the Honorable William C. East, Senior Judge of the Oregon District Court; Honorable Warren J. Ferguson, California Central District.

At least one theory of the attack of that case on the constitutionality of California Penal Code §311.2 is that the First and Fourth Amendments, through the Fourteenth Amendment, of the United States Constitution, deprives the several States of any power to restrict, on the ground of obscenity, exhibition of motion pictures to consenting adults who pay an admission price to see the exhibition.

The point is that the depiction of sexual acts, no matter how unconventional or objectionable to general standards in

the community, still represents the depiction of ideas of behavior of human beings. The First Amendment tells us that, within reason, the State may not interfere in dissemination of ideas. The Fourth Amendment tells us that an activity done in privacy cannot be interfered with by the State unless there is probable cause to believe there is violation of a valid criminal statute.

Accordingly, an adult who knowingly pays money to enter a theater in order to see a film is paying for privacy to consider ideas. The State can have no legitimate interest in interfering with such activity which is plainly a right protected by the First and Fourth Amendments to the United States Constitution through the Fourteenth Amendment.

Obviously, due process requires that if the individual cannot be molested in paying for the privilege of viewing or conserving ideas in a private place, the person supplying the place and the ideas for consideration cannot be interfered with either. Otherwise the right first considered would become meaningless.

It follows that Miller, supra, must be restricted to its facts and cannot be applied to the censorship of motion pictures to be shown in a private place to consenting adults, knowing what they are going to see, and paying a price.

IV

Since There Was a Conflict Between the Trial Judge and the Defense Attorney as to the Proper Content of the Settled Statement Certified to the Appellate Court by the Trial Judge, it Was Reversible Error to Deny Petitioner's Motion For the Preparation, Without Cost to Petitioner, of a Reporter's Transcript of the Trial Court Proceedings For the Purposes of Appellate Review

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It is now settled that as a matter of due process a State Court must supply a Reporter's Transcript of the trial proceedings to a convicted defendant in a felony case for the purposes of appeal.

In the case at hand, petitioner demanded such a transcript but the Court refused to order it. Plainly, the aggregate consequences of her sentence are the same as though she had been convicted of

a felony.

Failure to provide petitioner with a transcript is especially important to this case because of the discrepancy between the facts of trial as remembered by the trial Court and as remembered by the defense counsel. Fundamental fairness is a prerequisite of due process (See Gagnon v. Scarpelli, 41 U.S. Law Week 45, ___ U.S. ___). It is manifestly unfair for the trial Judge to establish a record for appeal that is contrary to the record that the appellant's attorney in fact believes should exist. The Reporter's Transcript would solve the problem.

It follows that it was a violation of the due process clause of the Fourteenth Amendment to the United States Constitution for the State Courts to deny petitioner a free transcript of the proceedings during trial for the purposes of appeal and to settle the differences between the trial Judge and the petitioner's attorney as to what transpired during such proceedings.

V

The Judgment Should be Reversed Because the Jury Instructions Measured Obscenity by a "Controlling Community" Defined to be the Entire State of California

Jury instructions state in part "for the purposes of determining the obscenity of the material here in question, the controlling community is the entire State of California . . . the standard of any such local community may not be taken in and of itself, to establish the state-wide standard, though it may be considered as some evidence of what the state-wide standard is."

This is directly contrary to the requirements of the constitution as delineated in Miller v. California, 413 U.S. 15.

It is there expressly held that the controlling community is the local community where the purported pornography is found.

In the case at hand, the prosecution presented the testimony of an expert who based his opinion upon state-wide

experience to the effect that the pictures in question were obscene. And that each of them taken as a whole and applying the standards of the entire community of the State predominantly appeal to the prurient interest of the average adult person, went substantially beyond the customary limits of candor in the State of California and were utterly without redeeming social importance. The substance of this testimony appears in the engrossed statement at page 6, lines 15-22.

On the other hand, numerous defense exhibits forming part of the record show the local community standards, i.e., the standards of the community where the alleged obscene pictures were shown, are very broad indeed and undoubtedly will include the films in issue within their purview as not being objectionable.

It follows that the jury might have believed that according to local community standards the films were not obscene but that according to state-wide community standards the films were obscene and that, therefore, they found petitioner guilty by reason of this erroneous jury

instruction erroneous in view of Miller.

It follows that the erroneous jury instruction was the cause of reversible error.

CONCLUSION

For the reasons outlined above the Writ of Certiorari should be granted.

Respectfully submitted,

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